United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-1009

UNITED STATES OF AMERICA

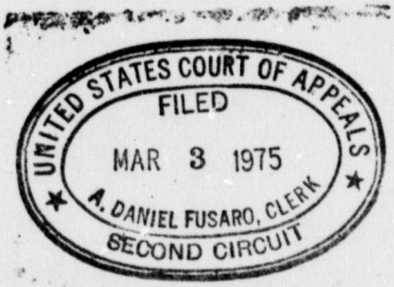
Plaintiff-Appellee

VS.

GEORGE H. BENNETT, JR.

Defendant-Appellant

BRIEF OF THE DEFENDANT-APPELLANT GEORGE H. BENNETT, JR.



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STATEMENT OF THE CASE

On September 21, 1973, an indictment charging, in each of two counts, that the appellant had violated Title 18 U.S.C. §2312, Transportation of a Stolen Motor Vehicle in Interstate Commerce, was handed down by the Grand Jury sitting for the United States District Court for the Middle District of Pennsylvania. On said date, an order for warrant for the arrest of the appellant was issued under the bail reform act. On September 24, 1973, a notice of arraignment was sent to the appellant who was, at that time, incarcerated in the Albany County Jail, Albany, New York. On October 18, 1973, the appellant entered the plea of "not guilty" to each count of the indictment. On November 12, 1973, the Court was informed by the U.S. Attorney that the case would be transferred to the District Court for the Northern District of New York pursuant to Rule 20. Photocopies of all material were sent to that Court on November 17, 1973.

On January 9, 1974, the appellant was arraigned and entered a plea of guilty to each of the two counts. On February 4, 1974, the appellant was sentenced. On March 13, 1974, appellant filed Notice of Appeal.

ISSUES PRESENTED

I. Were the appellant's convictions the results of statements obtained in violation of his Fifth Amendment rights?

II. Were appellant's guilty pleas involuntarialy?

III. Did the federal indictment subject the appellant to double jeopardy?

THE FACTS

The appellant alleges that appellant was arrested in the State of New York, by local police authorities immediately after having committed a state crime. Immediately after his apprehension and prior to the appellant being informed of his constitutional right, appellant gave statements to the local authorities which implicated him in violations of Title 18 U.S.C. §2312. That information was given to federal authorities and subsequently led to the handing down of a federal indictment against the appellant. On arraignment in the District Court for the Northern District of New York, pursuant to Rule 20, appellant entered guilty pleas to that indictment.

I.

THE APPELLANT'S CONVICTIONS WERE THE RESULT OF UNLAWFULLY OBTAINED STATEMENTS MADE TO STATE AUTHORITIES.

It is appellant's contention that the findings of guilty entered against him for two counts of violating 18 U.S.C. Sec. 2312, Interstate Transportation of Stolen Motor Vehicle, should be vacated as they resulted from the use, by federal authorities, of statements made to state authorities by the appellant before he was sufficiently advised of the rights available to him as enunciated by the U.S. Supreme Court in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed 2d 694 (1966). Although it is not appellant's intention to attack the validity of the state conviction by contending that the confession obtained by state authorities was illegal, appellant must draw this Court's attention to the fact that it was the state confession, as well as statements made by him at the time of his apprehension, which led to the federal indictment, and that that confession and those statements, as they relate to the federal violations, were unlawfully obtained.

It is not necessary in this brief to review the development of decisional law which led to the establishment of what are called the Miranda warnings. Suffice it to say that when a person is arrested, he must be given those warnings before any statement or confession can be introduced in evidence and accepted as true. However, as with most, if not all, constitutional rights, the right against self-incrimination can be waived but for the waiver to be valid, it must be voluntary and intelligent. It is the intelligent exercise or waiver of the Fifth Amendment

privilege which is the heart of the Court's concern in Miranda. United States v. Dickerson, 413 F. 2d 1111, 1114 (7th Cir. 1969), and although there is no text book definition of what in fact is an intelligent waiver, it has been stated that a knowing and intelligent waiver is one "done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). Thus it is apparent from the foregoing that if one waives those rights available to him but is either unaware of, or fails to appreciate, the consequences of his waiver, then it is difficult to characterize that as an intelligent, valid waiver. In U.S. v. Dickerson, Supra, the Court of Appeals for the Seventh Circuit had before it a contention forwarded by the appellant that the evidence presented against him in the trial court was evidence which he himself gave to investigating authorities before he was informed that the tax investigation was in fact a criminal investigation and those statements obtained by the tax agents were in violation of his Fifth Amendment rights. In rejecting the government's contention that since the Internal Revenue Service agents could not determine whether a crime had been committed until their investigation was complete, the adversary process had not sufficiently focused on the suspect as to require that warnings be given, the Court stated:

> "But it is the very fact that the taxpayer is not informed of the pendency of a criminal investigation which aggravates the dilemma in which he finds himself. Unaware of the possible consequences of his cooperation with the agents, he may nevertheless believe that he is obligated to supply the necessary information in order to satisfy any possible tax deficiency which he may owe." 413 F. 2d at 1116

As with the appellant in the Dickerson case, the appellant in this instance

suffered a similar fate.

Accepting arguendo that the present appellant was given his rights by the state authorities, the question must be asked whether he could waive his rights against self-incrimination with regard to federal violations when he was unaware that what he was saying to state authorities would be used against him by federal authorities. It is the appellant's contention that the answer to the foregoing question is no, there can be no intelligent waiver of a right against self-incrimination when a suspect is not fully aware of the consequences of his waiver, for before there can be a valid waiver, it must be shown that there was "an intentional relinquishment or abandonment of a known right or privilege". United States v. Michael, 426 F. 2d 1067, 1069 (7th Cir. 1970). Similarly, it is unquestioned that a right cannot be waived until its existence is known; therefore, in this matter, there was surely no such waiver.

Appellant also contends that the statements obtained by the state authorities were not voluntarily made. Courts will determine voluntariness only after considering all of the relevant circumstances surrounding the giving of the statement or confession. See Generally Brady v. United States, 397 U.S. 742. As with the question of whether there was an intelligent waiver, a statement or confession cannot be considered voluntary unless the person knows what the consequences of his statement will be. Since in this case, the appellant had no reason to suspect that he was subjecting himself to potential federal prosecution, and was not warned that said prosecution could be forthcoming, the only conclusion which can be arrived at is that the appellant's rights against self-incrimination were violated.

Appellant further contends that without the statements obtained by the state authorities, it would have been highly doubtful whether the federal authorities could have obtained sufficient evidence to secure convictions for the federal offenses, and for that reason, the guilty findings against him should be vacated, and the charges dismissed.

II.

APPELLANT'S GUILTY PLEAS WERE INVOLUNTARILY ENTERED.

Appellant contends that the guilty pleas he entered should be vacated for either one of two reasons:

(1) After the statements and confession were given by the state authorities to the federal authorities, appellant believed that there was no successful defense available to the federal prosecutions; or

(2) Appellant understood there to be an implied arrangement with the U.S. Attorney whereby the federal and state sentences would run concurrently.

It is appellant's contention that the federal indictment was a direct consequence of statements made by appellant to state authorities. Upon presentment for plea, appellant initially pleaded "not guilty" to the two counts of violating 18 U.S.C. Sec. 2312. However, at a later time, appellant changed his plea to "guilty" on both counts. As a guilty plea is generally viewed as a waiver of certain constitutional rights, including the right against self-incrimination, United States v. Michael, 426 F. 2d at 1069, Brady v. United States, 397 U.S. at 801, the District Court judge inquired of the appellant as to the voluntariness

of his plea. The appellant, in response to said inquiry, stated that he was fully appraised of his rights and knew the consequences of his plea; however, as it has previously been demonstrated, he was unaware that he could challenge the use of the statements obtained by state authorities, as well as any other evidence which was obtained as a consequence of those statements. If he had been aware of his rights, he would certainly have asserted them.

As a practical matter, he withdrew his not guilty plea when he was advised of the evidence the Government had against him. The natural reaction of any person, upon being advised that there is little doubt that a conviction can be obtained after a trial, is for that person to admit guilt and ask the sentencing court to show leniency toward him. This, in essence, is what the appellant did, but in so doing he was unaware of the rights available to him as he had not been adequately advised of them and had never been in a similar situation. He thought he had no other option but to plead guilty, and for this reason his conviction and guilty pleas should be vacated; however, appellant also contends that they should be vacated for still another reason.

Appellant was of the understanding that the sentencing court would decree his federal sentence to be concurrent to the state sentence which he was then serving. Indeed, the state crime, to which he pleaded guilty, was of a more serious nature than the federal crime; however, he received a heavier sentence from the federal court. If he had been informed that he was to receive such a sentence or that it was to be consecutive, he certainly would have pleaded not guilty and would have ended his cooperation with the U.S. Attorney. As a re-

sult of this misunderstanding, his guilty pleas cannot be characterized as voluntary.

> "The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit: '(A) plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by ..., misrepresentation (including unfulfilled or unfulfillable promises) ...'." Brady v. United States, 397 U.S. at 755.

Easily, it can be seen that appellant was not fully aware of the direct consequences of his plea, and the possibility that the misunderstanding was not caused by a conscious misrepresentation of the U.S. Attorney is of no consequence as it, no matter how caused, renders the character of appellant's pleas involuntary.

III.

APPELLANT'S FEDERAL INDICTMENT SUBJECTED HIM TO DOUBLE JEOPARDY.

At the insistence of the appellant, it is contended that the federal indictment violated the appellant's right against double jeopardy. As the exact concept of what is "double jeopardy" is somewhat amorphous, it is necessary to present the opposing concepts.

The test which was formulated by Chief Justice Shaw in Morey v. Commonwealth, 108 Mass. 433, cited in United States v. Cioffi, 481 F.2d 492, 496 (2d Cir. 1973), although subject of much criticism, has never been overruled and is still accorded much respect.

In Morey, Chief Justice Shaw stated that double jeopardy would apply if "the evidence required to support a conviction upon one of them (the indictments) would have been sufficient to warrant a conviction upon the other". 108 Mass. at 434. Concededly, if this were the test to be applied to the current appellant, his claim of a violation of his right against being placed in double jeopardy would have to fail, for the evidence required to seek the federal conviction was different from that required to obtain his state conviction. However, Justice Shaw's test is not universally accepted.

The apposing and, appellant believes, the better approach is the single transaction test which was stated by the concurring Justice in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). According to that test, double jeopardy applies where many crimes arise out of the same transaction. If this test were to be followed, appellant's federal indictment indeed subjected the appellant to double jeopardy, for the interstate transportation of stolen vehicles was part and parcel of the state crime.

It is further contended, that it is wholly conceivable that the state judge considered the violations of the federal crimes when he imposed his state sentences.

Because the appellant believes that the single transaction test is the proper test to apply, the appellant asks that the guilty plea be vacated as his Fifth Amendment right against double jeopardy was violated.

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	)	
Defendant-Appellant	)	

CERTIFICATE OF SERVICE

This is to certify that a copy of appellant's brief and the appendix thereto was forwarded this 28th day of February, 1975, via U.S. Mail, postage prepaid, to Assistant United States Attorney, Paul French, at the United States Courthouse and Post Office, Albany, New York 12207.

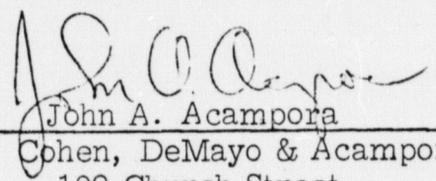
John A. Acampora, Attorney for
appellant, George Henry Bennett, Jr.

CONCLUSION

Appellant respectfully asks that this Court vacate the findings of guilty against him as they were obtained as the result of violations of his Fifth Amendment protections.

Respectfully submitted,

THE APPELLANT

By 
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